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Supreme Court, U.S.
FILED

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

TERRY PRESTON ADAMS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Harold J. Bender
200 N. McDowell St.
Charlotte, NC 28204
704/333-2169

Counsel for Petitioner

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-7000

28 pp

QUESTION PRESENTED

Is the refusal of the Court to define "reasonable doubt" a due process violation?

DESIGNATION OF PARTIES

Petitioner Terry Preston Adams has been sentenced to a sixty-three (63) month sentence under the supervision of the United States Bureau of Prisons. He is represented by privately retained counsel. Respondent is the Government.

TABLE OF CONTENTS

PAGE

Question Presented.....1

Designation of Parties.....2

Table of Contents.....3

Table of Authorities.....4

Opinion Below.....5

Jurisdictional Statement.....5

Constitutional and Statutory Provisions Involved.....5

Statement of the Case.....6

Conclusion.....13

TABLE OF AUTHORITIES

CASES: **PAGE**

Sullivan v. Louisiana, _____ U.S. _____, 113 S.Ct. 2078, 2080, 124 L.Ed 2d 182 (1993)..... 10

United States v. Hall, 854 F.2d 1036 (7th Cir. 1988)..... 12

United States v. Reives, 15 F.3d 42 (4th Cir. 1994)..... 12

FEDERAL STATUTES:

28 U.S.C. §1254(1)..... 5

21 U.S.C. §§846 and 841(a)(1)..... 6

CONSTITUTION:

Amendment V..... 5

Amendment VI..... 6

OPINION BELOW

A copy of the Unpublished Opinion of the Court of Appeals whose judgment is sought to be reviewed is attached hereto in the Appendix (App. 1).

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the Fourth Circuit affirming the Petitioner's conviction and sentence was entered on January 10, 1994. This Petition for Writ of Certiorari is filed within ninety (90) days of that date. The Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Terry Adams was prosecuted and convicted of violation of Title 21 U.S.C. §§846 and 841(a)(1).

The Government's case, in the light most favorable to it, tended to show that Petitioner Adams travelled from his home in Tennessee to Boone, North Carolina on March 6, 1990 to meet his former business partner, Herbert Lombardo. After arriving in Boone, Lombardo, driving his own automobile, took Adams to the home of Trey Webb. While at the home of Trey Webb, some phone calls were exchanged and Webb left Petitioner Adams and Lombardo at his home. In a subsequent phone call back to his house, Webb told Lombardo that the deal was off. As Lombardo was leaving, with Adams in the passenger's seat, the vehicle was stopped and both individuals were arrested. A kilogram of cocaine was found under the passenger seat, but it could not be seen until it was pulled from under the seat.

A subsequent fingerprint analysis

was conducted on the kilogram packaging. Although four (4) latent prints of value were found on the packaging, none of those prints belonged to Petitioner Adams.

Petitioner Adams testified that Lombardo owed him money as a result of their dissolved partnership in an automobile repair business. After several heated discussions concerning the money, Lombardo promised to pay Petitioner Adams if he would come to Boone on March 6, 1990. Adams further testified that he never participated in any discussions with Trey Webb, never heard any statement about cocaine and never saw any cocaine.

Petitioner, through counsel, submitted a proposed reasonable doubt instruction to be given to the jury. The District Court refused to give the

instruction as tendered and refused to define "reasonable doubt" to the jury.

After the jury verdict, counsel for Petitioner Adams questioned a juror who indicated that there was a great deal of confusion about whether Petitioner Adams knew or did not know about the drugs in the vehicle. This statement indicates doubt on the part of the jury.

Following the return of the jury's verdict and the Court's sentence, Petitioner Adams appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals, in a Per Curiam Unpublished Opinion, affirmed the conviction.

ARGUMENT FOR ALLOWANCE OF THE WRIT

(1) Although requested to do so by the Petitioner, the District Court Judge refused to charge the jury on the term "reasonable doubt". The failure to do so

allowed the jury to simply speculate as to the guilt of the Petitioner. The juror's comment concerning the confusion about whether Petitioner Adams knew or did not know of the cocaine in the vehicle is clear evidence that the uninformed and uninstructed jury thought Adams was probably guilty.

Allowing the jury to speculate on the probability of guilt has been condemned by this Court.

> It would not satisfy the Sixth Amendment to have a jury determine that the Defendant is probably guilty, and then leave it up to the judge to determine whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Sullivan v. Louisiana, _____ U.S. _____, 113 S.Ct. 2078, 2080, 124 L.Ed 2d 182 (1993).

The Court's instruction in this case did not adequately convey the legal definition of reasonable doubt or the

role which the concept of reasonable doubt plays throughout the jury's deliberation. The expressed confusion by the average juror on the panel is a strong indication of how prejudicial the failure of the Trial Court to define reasonable doubt was to this Petitioner. Out of this confusion came a guilty verdict.

The Due Process Clause is violated when a jury is left to speculate on the "beyond a reasonable doubt" standard. The Court of Appeals for the Fourth Circuit failed to consider the previous decision of this Court in denying the Petitioner relief. Petitioner urges the Court for a review of this case because of the erroneous decision of the Fourth Circuit.

(2) This is an important question of federal law which has not been, but

should be, settled by this Court.

Apparently, only the Fourth Circuit and the Seventh Circuit continue to admonish trial courts to refrain from attempting any definition of "reasonable doubt". United States v. Reives, 15 F.3d 42 (4th Cir. 1994); United States v. Hall, 854 F.2d 1036 (7th Cir. 1988). All other Circuits provide guidance to the trial courts by using a pattern jury instruction for this elusive concept.

The conflict among the Circuits needs to be resolved by this Court. This Court has the opportunity to provide a clear and definitive explanation of reasonable doubt to be used in all criminal cases in this country. This important question of law remains unsettled and the conflict among the Circuits needs to be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Petitioner Terry Preston Adams respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted, this the 7th day of April, 1994.

HAROLD J. BENDER
200 N. McDowell St.
Charlotte, NC 28204
(704) 333-2169

Counsel for
Petitioner

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

TERRY PRESTON ADAMS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

Harold J. Bender
Counsel of Record
200 North McDowell Street
Charlotte, North Carolina 28204
704/333-2169

Attorney for the Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America,
Respondent,

v. No. 93-5189

Terry Preston Adams,
Defendant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville.
Graham C. Mullen, District Judge
(CR-91-11-ST-CR-MU)

Submitted: December 9, 1993

Decided: January 10, 1994

Before WIDENER, HAMILTON, and LUTTIG, Circuit Judges

AFFIRMED BY UNPUBLISHED
PER CURIAM OPINION

COUNSEL

Harold J. Bender, LAW OFFICE OF HAROLD J. BENDER, Charlotte, North Carolina, for Appellant, Jerry W. Miller, United States Attorney, H. Thomas Church, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

OPINION

PER CURIAM:

Terry Preston Adams appeals from his jury convictions of conspiracy to possess with the intent to distribute, 21 U.S.C. §846 (1988), and aiding and abetting the possession of cocaine with intent to distribute, 21 U.S.C. §841(a)(1)(1988) and 18 U.S.C. §2 (1988), and his resulting sentence of sixty-three months imprisonment and four years of supervised release. Because we find that the court did not err in admitting the testimony of various government witnesses, that the Government did not knowingly introduce false testimony, and that the court did not err in its handling of a jury instruction on the definition of reasonable doubt, we affirm Adams's conviction and sentence.

Officers of the Catawba County Sheriff's Department arranged an

undercover purchase of cocaine with the cooperation of Teddy Clark ("Clark"), who they previously arrested for LSD trafficking. Clark negotiated the purchase of one kilogram of cocaine from Trey Webb ("Webb"), who agreed to meet Clark in a parking lot, where the officers arrested him. Upon his arrest, Webb agreed to cooperate with the authorities. Webb informed the officers that Herbert Lombardo ("Lombardo") was his source of the cocaine. Lombardo arrived at Webb's house on the day of the proposed sale of the cocaine with the Appellant, Terry Adams ("Adams"), who rode in the front passenger seat of Lombardo's car. Adams and Lombardo were business partners. Webb informed the officers who arrested him that Lombardo and Adams were at his house; that the cocaine was in their car; and that Adams "appeared to be calling the shots."

After his arrest, Webb called his home and told Lombardo that the sale was off and that he and Adams should leave.

Police officers stopped Lombardo's car as he and Adams were leaving Webb's residence; Lombardo was driving and Adams was a passenger. The officers discovered a kilogram of cocaine underneath Adams's seat in their search of the car.

Adams testified that he went to Webb's house with Lombardo to obtain money that Lombardo owed him. He continued that he did not know cocaine was in the car and that he had nothing to do with the cocaine sale.

Adams alleges that the court improperly admitted certain statements from Clark and Webb. He objects to Clark's testimony that Webb informed him that the cocaine came from Bristol, Tennessee and Webb's statements that he informed Clark the cocaine was from

Bristol, that the cocaine was from Bristol, and that Lombardo informed him in Adams's presence that the cocaine was in the car.

Under Fed. R. Evid. 801(3d)(2)(E), a statement made by a co-conspirator of a party during the course and in furtherance of a conspiracy is not hearsay when offered against a party. To admit such evidence, the court must conclude that there was a conspiracy involving the declarant and the party against whom the statement is admitted and that the challenged statements were made in furtherance of the conspiracy. United States v. Blevins, 960 F.2d 1252, 1255 (4th Cir. 1992). The court's decision is reviewed for abuse of discretion. Id. The court need not make explicit findings on these issues, but the record must support admission of the evidence. Id. at 1256. The government

must prove the existence of a conspiracy and the defendant's involvement in it by a preponderance of the evidence to establish admissibility of a co-conspirator's statement under Rule 801 ((d)(2)(E). The court may examine hearsay statements sought to be admitted in determining whether the government has met its burden. Bourjaily v. United States, 483 U.S. 171, 181 (1987).

Since a preponderance of the evidence establishes that Adams was involved in a conspiracy with Clark, Lombardo and Webb and that the challenged statements were made in furtherance of that conspiracy, we find that the court did not err in admitting the statements Adams challenges on appeal. Webb testified, without any objection from the defense, that Lombardo informed him in Adams's presence that the cocaine was in the car in which (Lombardo) and Adams had

arrived. The cocaine was later found in the car underneath Adams's seat. Webb also testified that Adams stated the cocaine could never leave his sight. Therefore, the statements to the effect that the cocaine was from Bristol were properly admitted under Rule 801(d)(2)(E).

As we previously noted, Adams did not object to Webb's testimony that Lombardo stated in front of Adams that the cocaine was in the car in which they had arrived. Therefore, we review admission of that testimony for plain error. Fed. R. Evid. 103(a)(1), 103(d); Fed. R. Crim. P. 52(b). Webb's testimony concerning Lombardo's statement concerning the location of the cocaine was not offered to establish its truth. It was offered to demonstrate that Adams knew the cocaine was in the car. Since the statement, therefore, was not hearsay

as defined by Fed. R. Evid. 801(c), the court did not commit plain error in admitting it. See United States v. Olano, 61 U.S.L.W. 4421, 4423-24 (U.S. 1993).

Adams alleges that the Government knowingly introduced false testimony when a police officer testified that he did not know the whereabouts of Lombardo. Police reports disclosed that there was an investigation of an incident in which Lombardo may have committed suicide by jumping off of a bridge. The police speculated, however, that the incident might have been staged since Lombardo's body was never found. After discussion of the testimony outside of the jury's presence, the court agreed to the defense's request to instruct the jury that Lombardo's whereabouts was not an issue for their consideration.

A prosector's knowing use of a

perjured testimony or knowing failure to disclose that testimony used to convict a defendant was false is a violation of due process, and a conviction must be set aside if there is any reasonable likelihood that false testimony could have affected the judgment. United States v. Bagley, 473 u.s. 667, 678 (1985). The defendant must show the prosecutor or other government official knew the testimony was false. Stockton v. Virginia, 852 f.2D 740, 749 (4th Cir. 1988), cert. denied, 489 U.S. 1071 (1989).

Adams's claim fails in several respects. First, the record does not support his allegation that the testimony was false. There is no indication that the officer lied when he stated he did not know where Lombardo was. In addition, even if the testimony was false, we find there is no reasonable

likelihood that the testimony affected the judgment against him since the court gave a curative instruction that Adams requested. Finally, even if the testimony was false, there is no indication in the record that the prosecutor knew it to be false.

Adams next objects to the court's handling of a jury instruction on the definition of reasonable doubt. After thoroughly instructing the jury on the presumption of innocence and the burden of proof, the court stated:

> The term "reasonable doubt" means just what it says. It is a doubt based upon reason and common sense. Its meaning is no doubt self-evidence and understood by you and the court will not attempt to define the term further.

Adams did not object to this instruction, but he did offer his own proposed

instruction on reasonable doubt that the court refused.

Under Fed. R. Crim. P. 30, a party must object to a jury instruction before the jury retires to consider its verdict in order to preserve the issue for appellate review. Adams did not object to the court's jury instruction on reasonable doubt even though the court explicitly solicited comment from the parties after instructing the jury. Therefore, we find that Adams has waived our consideration of this issue under Rule 30 even though the court rejected his proposed instruction. Whether the court erred in rejecting Adams's proposed instruction is a separate issue from whether the court ultimately adequately instructed the jury.

Even if Adams had properly preserved the issue for our review, his claim is meritless. This Court disapproves of

judicial efforts to define reasonable doubt absent a specific request from the jury itself. United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988). We also note that a portion of the court's instruction is identical to part of Adams's proposed instruction.

Finally, Adams alleges that the trial court improperly permitted Webb to testify that it appeared to him that Adams was "calling the shots". Webb had previously testified that Adams stated that the cocaine could not leave his sight and that the transaction could occur in a nearby shed if Lombardo was present. Under Fed. R. Evid. 701, a witness who is not testifying as an expert may express opinions or inferences that are (1) rationally based on the perceptions of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination

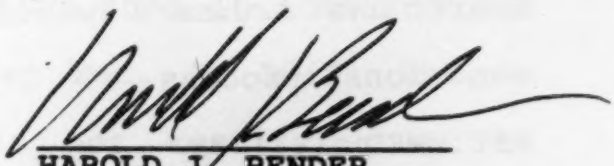
of a fact in issue. Webb's testimony meets both of these criteria. Webb's conclusion was rationally based on his perceptions of Adams's behavior on the day the cocaine sale was to occur. The testimony was helpful in determining Adams's role in the conspiracy. Therefore, the court did not err in admitting the testimony.

For these reasons, we affirm Adams's convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that on this the 8th day of April, 1994, one copy of the Petitioner's Writ of Certiorari was mailed, first class, postage prepaid, to H. Thomas Church, Assistant United States Attorney, Western District of North Carolina, 401 West Trade Street, Charlotte, North Carolina 28202 and to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, under Rule 29.4(a) and 29.5(b) of this Court.



HAROLD J. BENDER
200 N. McDowell St.
Charlotte, NC 28204
(704) 333-2169

Counsel for
Petitioner